Supreme Court know that *Ring v. Arizona. 536 U.S. 584 (2002)* would make proper instructions to the jury an essential element of Mr. Armstrong's trial.

Now, the Petitioner faults the Florida Supreme Court's harmless error analysis complaining that this Court should review the case on the basis of a "materiality" requirement that it perceived was not addressed in *Johnson v. Mississippi*. See, Petition for Writ of Certiorari at page 7. However, the Florida Supreme Court had already considered whether the jury's consideration of the unconstitutional Massachusetts conviction was material to the jury's decision on whether to impose death.

> In Armstrong's case, the jury considered, in support of an aggravating factor, evidence of a conviction that has since been revealed to be materially inaccurate as that conviction has been vacated. It is now clear that reliance upon that conviction to support Armstrong's sentence was erroneous under *Johnson*. Given the nature of the crime underlying the conviction–a sexual offense upon a child– and the detailed testimony given by the young victim of that crime at Armstrong's penalty phase, we cannot say that the consideration of Armstrong's prior felony conviction of indecent assault and battery on a child of the age of fourteen constituted harmless error beyond a reasonable doubt.

Armstrong v. State, 862 So.2d 705 (Fla. 2003).

Despite the Florida Supreme Court's specific statement that it found the

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investigation in this case under a *Wiggins* analysis. However, my hope is that judges and lawyers will heed the message of *Wiggins...*" *Armstrong v. State, 862 So.2d 705 (Fla. 2003).*

Massachusetts conviction to be "material" because it could not assess the impact of the victim's testimony on the jury as harmless, the Petitioner suggests that a further materiality standard needs to be enunciated by this Court. Petitioner also suggests that because two other contemporaneous felonies existed, the unconstitutional Massachusetts conviction could not possibly be harmful. But that is not what this Court has held should be the standard.

This Court held:

> ...the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. **Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate.**

Johnson v. Mississippi, 108 S. Ct at 1988 [emphasis added].

The Supreme Court made this distinction before the advent of *Ring v. Arizona, 536 U.S. 584 (2002)* which now mandates that a jury must be properly instructed because the aggravators are an element of the charged offense.

Here, the penalty phase jury did not know that the prior violent felony was unconstitutional or that Mr. Armstrong was not properly advised of his rights by his defense counsel at the time of his plea in Massachusetts. The jury was confronted not only with testimony of John Clough, Assistant Clerk Magistrate from Massachusetts, to authenticate a certified copy of Mr. Armstrong's

unconstitutional conviction for felony indecent assault and battery of a fourteen-year-old, but also graphic and emotional testimony from Rose Flynch, the alleged victim of the sexual battery. The jury considered this unconstitutional aggravating circumstance.

The Florida Supreme Court could not ignore the weight that this improper aggravator had on the jury and recognized that this inadmissible testimony could have swayed the jury to vote for death. Even given the graphic testimony of Ms. Flynch and Mr. Clough, three jurors voted against the imposition of the death penalty. The Florida Supreme Court also could not ignore that in its direct appeal opinion it had held that the prior violent felony aggravating factor was still applicable specifically because of the Massachusetts conviction. See *Armstrong v. State, 642 So.2d 730, 738 (Fla. 1994).*

The prosecution introduced only two witnesses at penalty phase and only those two testified about the Massachusetts conviction. The Petitioner now downplays the importance of these witnesses even though it went to the time and expense of transporting the victim from Massachusetts, paying for her stay in Florida and preparing her to relive the crime in front of the jury. Clearly, the prosecution believed it was worth time and effort to introduce the victim's testimony to the jury. Petitioner chose to present Ms. Flynch's testimony to

support the Massachusetts prior as an aggravating circumstance.

Petitioner also chose to present Rose Flynch's testimony on the same day the prosecutor gave his closing argument urging the jury to give Mr. Armstrong death. The prosecutor specifically referred to "the indecent assault on Rose Flynch that you have heard this morning" (R. 1933). Petitioner's claim that it did not give "undue emphasis" to the Massachusetts conviction is simply not true. It specifically chose that case and that victim to maximize the emotional impact on the jury. It cannot now pretend it would not have made a difference to the jury when it was so carefully orchestrated in the first place.

Under *Chapman v. California, 386 U.S. 18 (1967)* the State, as beneficiary of the error, is required to prove beyond a reasonable doubt that the error did not contribute to the verdict. It cannot make that claim when it brought two live witnesses to describe to the jury the circumstances of the unconstitutional aggravator in vivid detail. The other two convictions used to support the prior violent felony aggravating factor arose out of the same episode that resulted in the murder conviction. That is why the Massachusetts prior felony was so important to the prosecution. The sexual assault prior felony was the sole conviction that would show prior criminal history **before** the night of the crime. The Florida Supreme Court was correct in finding that the introduction of the unconstitutional

Massachusetts prior felony was not harmless beyond a reasonable doubt.

Finally, the Petitioner argues a number of cases to support its position that the Florida Supreme Court's decision was in conflict with a number of circuits. Petitioner cited *California v. Roy, 519 U.S. 2 (1996)* , *Romano v. Oklahoma, 512 U.S. 1 (1994)* and *Rodriquez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989)* as proof that the Florida Supreme Court's harmless error analysis was "perfunctory." See, Petition for Writ of Certiorari at pages 7-8. Yet, none of these cases deal with same factual scenario as Mr. Armstrong's case.

In *Rodriquez*, this Court dealt with a civil arbitration case in which this Court was required to decide whether a pre-dispute agreement to arbitrate claims under the Securities Act of 1933 was enforceable. There were no arbitration or securities issues present in Mr. Armstrong's case.

In *California v. Roy*, this Court was required to decide whether a trial judge's failure to give a jury instruction on an intent element of the crime was harmless. This Court held that the proper standard was to find whether the omission had a "substantial and injurious effect or influence" on the jury's verdict. Petitioner is equating a sexual assault victim's testimony to a jury on an unconstitutional prior violent felony conviction with failing to give a jury an instruction on intent in a non-capital case. The situation here is completely

distinguishable. In Mr. Armstrong's case, the jury considered the victim's testimony because it was instructed to do so, and the trial judge relied on that testimony in his order sentencing Mr. Armstrong to death. There was no question the jury considered the information. The Florida Supreme Court has already found that the unconstitutional Massachusetts conviction affected the jury verdict. Thus, *Roy* does not apply, nor is its holding contrary to the Florida Supreme Court's decision.

Finally, *Romano v. Oklahoma* explicitly rejected the notion that *Johnson* error required an automatic reversal of a death sentence based on a admission of prejudicial or irrelevant evidence. As previously stated, the Florida Supreme Court said it did not apply an automatic reversal rule in evaluating Mr. Armstrong's case. See, *Armstrong v. State, 862 So. 2d 705 (Fla. 2003)*. None of these cases demonstrate a conflict between the Florida Supreme Court's decision with other circuits on the same set of facts.

The only case remotely similar to Mr. Armstrong's case is *Spivey v. Head, 207 F.3d 1263 (11th Cir. 2000)*, in which the Eleventh Circuit Court of Appeals refused to disturb a lower court's finding of "minimal" impact of a *Johnson* violation under the *Brecht* standard.[3] Again, this case is not contrary to the

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[3]See, *Brecht v. Abrahamson, 507 U.S. 619 (1993).*

Florida Supreme Court's decision, in that the court in Mr. Armstrong's case found that the extensive testimony of the victim at penalty phase affected the outcome of the jury's decision to such an extent that confidence was undermined in the outcome. This was not the case in *Spivey* where the lower court found under the facts of Mr. Spivey's case the effect was neither substantial nor injurious.

Factual determinations made by the state court are presumed correct unless rebutted in one of eight possible ways, including the showing that the factual determination is not fairly supported by the record. 28 U.S.C. 2254 (d) (1995) (amended 1996). In Mr. Armstrong's case, the decision of the Florida Supreme Court is fairly supported by the record.

The writ should be denied.

CONCLUSION

Respondent, Lancelot Uriley Armstrong, requests that certiorari review be denied.

Respectfully submitted,

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